No. 82-1565

In the Supreme Court of the United States

OCTOBER TERM, 1983

BACCHUS IMPORTS, LTD., and
EAGLE DISTRIBUTORS, INC., *Appellants*,

vs.

GEORGE FREITAS, DIRECTOR OF TAXATION
OF THE STATE OF HAWAII, *Appellee*.

**On Appeal from the Supreme Court
of the State of Hawaii**

ON MOTION TO DISMISS OR REMAND

BRIEF FOR THE APPELLANTS IN OPPOSITION

FRANK H. EASTERBROOK
1111 East 60th Street
Chicago, Illinois 60637
Telephone: (312) 962-9579
W. REECE BADER
ROBERT E. FREITAS
JAMES A. HUGHES
Of ORRICK, HERRINGTON
& SUTCLIFFE
a Professional Corporation
600 Montgomery Street
San Francisco, California 94111
Telephone: (415) 392-1122
Of Counsel

ALLAN S. HALEY
410 Spring Street
Nevada City, California 95959
Telephone: (916) 265-5524
(Counsel of Record)

Attorney for Appellants
Bacchus Imports, Ltd.
and Eagle Distributors, Inc.

Pandick Press Midwest, Inc., Chicago • 454-7600

Table of Authorities

Cases

Constitution and Statutes

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1565

BACCHUS IMPORTS, LTD., and
EAGLE DISTRIBUTORS, INC., *Appellants*,

vs.

GEORGE FREITAS, DIRECTOR OF TAXATION
OF THE STATE OF HAWAII, *Appellee*.

**On Appeal from the Supreme Court
of the State of Hawaii**

ON MOTION TO DISMISS OR REMAND

BRIEF FOR THE APPELLANTS IN OPPOSITION

The appellee's motion to dismiss or remand asks this Court to hold summarily that the claim for refund of taxes is so insubstantial that the appellant wholesalers have no chance of recovering. The arguments in the motion do not establish this point. We return to that subject below. The more important objection to the appellee's arguments, however, is that the arguments made in the motion have nothing to do with this Court's jurisdiction.

1. This case is before the Court because the appellants challenged a state statute as in violation of the United States Constitution. The Supreme Court of Hawaii considered that claim on the merits and ruled in favor of the statute's constitutionality. The appellants took a timely appeal from the decision sustaining the state statute against federal attack. The Court noted probable jurisdiction. The jurisdiction of this

Court is based firmly on 28 U. S. C. § 1257(2). The motion to dismiss the appeal does not even mention § 1257(2), and it does not contend that this case is other than a constitutional challenge to a state statute.

The only argument that casts the slightest cloud on this Court's jurisdiction appears at pages 3-4 of the motion, where appellee suggests that, because of the expiration of the wine and okolehao exemptions on June 30, 1981, the case is moot. Yet this case is one seeking a refund of taxes paid. A case seeking a money judgment cannot be moot just because of the expiration of the statute that initially gave rise to the dispute. *City of Pittsburgh* v. *Alco Parking Corp.*, 417 U. S. 369, 372 n. 2 (1974).

Mootness arguments to one side, the appellee has used the vehicle of a motion to dismiss or remand in order to put his arguments on the merits before the Court in advance of the oral argument, now set for January 11. There is no reason why this Court, whose own jurisdiction is secure under 28 U. S. C. § 1257(2), should entertain these arguments on the merits at this stage. All of appellee's arguments can be considered at the hearing of the case on the merits.

2. A second reason for denying the motion is that, as the appellee admits (Motion at 3), the arguments he now asserts were not raised in the Hawaii courts.[1] The statute giving jurisdiction to this Court limits the arguments thay may be made here to those that have been raised and preserved below. *E.g., Cardinale* v. *Louisiana*, 394 U. S. 437 (1969); *Webb* v. *Webb*, 451 U. S. 493 (1981). Although a party need not assert

[1] The severability claim (Motion at 4) was raised below but not passed on by the state court. The status of the Twenty-first Amendment defense (*id.* at 4-5) is more cloudy. But both severability and the Twenty-first Amendment are so squarely addressed to the merits rather than this Court's jurisdiction that we need not discuss them here.

his arguments using any magic formula, *see Eddings* v. *Oklahoma,* 455 U. S. 104, 113-114 n. 9 (1981), the party must at least assert the outlines and basic support of the argument. The appellee did not even hint in the state courts that, as a matter of state law, the appropriate person to seek a refund of taxes wrongfully collected is other than the person who paid those taxes. (There is no such requirement in state law; see below.) And although a party may defend a judgment on any available ground, that ground must have been properly raised and preserved in the lower courts. *Hankerson* v. *North Carolina,* 432 U. S. 233, 240 n. 6 (1977) ("The State as respondent may make any argument *presented below* that supports the judgment of the lower court") (emphasis added); *United States* v. *New York Telephone Co.,* 434 U. S. 159, 166 n. 8 (1977). *Cf. Massachusetts Mutual Life Ins. Co.* v. *Ludwig,* 427 U. S. 479 (1976).

Appellee attempts to portray his argument that the economic incidence of the tax fell on persons other than wholesalers as one based on Article III of the Constitution, and thus as one that can be asserted at any time. This argument is incorrect, however. If state law, like Hawaii's, allows the payor of taxes to recover them, there is no Article III objection to a suit for refunds even were someone else shown to have borne the economic incidence of the tax. The Article III case or controversy comes from the fact that the party before the court is the one that will benefit from a decision in his favor. If the state's law allows refund suits by the payor of a tax, Article III interposes no bar to review by this Court. And because the appellee raised no state law objection to this suit for refunds, this Court must assume that under state law the appellants are the appropriate persons to recover. *Cf. Konigsberg* v. *State Bar of California,* 353 U. S. 252, 257, 259-261 (1957).

At all events, there could be no serious Article III objection even if it had been *established* in the lower courts—which it was not—that the economic incidence of the tax did not fall on the

taxpayers. In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1969), a defendant in an antitrust case attempted to argue that the direct payor of an overcharge had "passed on" the full overcharge to its customers. This Court assumed the truth of that argument and held that, as a matter of law, the direct payor could recover the full amount of the overcharge. It held this in part because any overcharge "takes from the [victim] more than the law allows" (392 U. S. at 489)—which is true here, too—and because in a complex economy it is almost inevitable that the direct payor of an overcharge (or a tax) will bear some of the economic incidence of the payment. *See also Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 731-33, 741-43 (1977) (discussing theory of economic incidence). *See also* McLure, *Incidence Analysis and the Supreme Court: An Examination of Four Cases From the 1980 Term*, 1 Supreme Court Economic Rev. 69 (1982).

3. A third reason for denying summary relief on the merits is that the "passing on" requirement is not an element of plaintiffs' case under Hawaii law. Even if cognizable, this would at best be a defense which, as noted earlier, was not presented below. This case is brought under two explicit refund statutes—one (Haw. Rev. Stat. § 244-8) dealing with refunds of liquor taxes, and the other (Haw. Rev. Stat. § 40-35) dealing with payments under protest.[2] Neither statute makes it a condition of the refund that the taxpayer have borne the burden

---

[2] H. R. S. § 244-8(c). If the taxpayer has paid or returned with respect to any month more than the amount determined to be the correct amount of tax for such month, the amount of the tax so returned and any assessment of tax made pursuant to the return may be reduced, and any overpayment of tax may be credited upon the tax imposed by this chapter, or at the election of the taxpayer . . . may be refunded. . . .

H. R. S. § 40-35(a). Any disputed portion of monies representing a claim in favor of the State may be paid under protest . . . . (b) Action to recover money paid under protest . . . may be commenced by the payer or claimant against the [person] to whom the payment was made . . . within thirty days from the date of payment . . . .

of the tax. Nor is there any Hawaii case law placing such a burden of proof on the taxpayer. Since the defense was not presented below, this Court is entitled to assume that it is not applicable to the facts of this case, and cannot consider it as a basis for affirmance. *O'Bannon* v. *Town Court Nursing Center,* 447 U. S. 773, 785 n. 17 (1980).

4. Our final response is that the set of facts portrayed by the appellee—with the wholesaler "stating" the tax separately and passing it on to the retailer—is simply not the set of facts presented by this record. As the record stands, the Court should take it as established that the wholesalers do bear the incidence of the tax. They bear its *legal* incidence, since the parties have stipulated that the wholesalers are liable for its payment whether or not their customers have paid their invoices by the due date, and a "substantial number of [appellant's] customers take more than thirty days to pay their bills." JA 15-16, 22. The appellants likewise bear the economic incidence of the tax, as it has been stipulated that appellants' imported wines and spirits "are rendered more expensive than comparable domestic products" (JA 16, 23)—in the case of European imports, nearly twice as expensive (JA 16-17, 23). Appellants' sales thereby suffer, and to sell at the same volume as before they are forced to take less of a markup to compensate for the discriminatory tax.

Indeed, the State's argument proves too much, since to stay in business every seller has to "pass on" his costs in the sense urged by appellee. The plain fact that a selling price is higher than a seller's costs, including taxes that he pays on the sale of his product, does not demonstrate without more that he has been "compensated for the tax." If that were the extent of the test, no tax refunds could ever be granted because every successful seller would fail to satisfy the test, and Hawaii's consumers could scarcely be expected to satisfy the requirements of Haw. Rev. Stat. § 40-35 every time they purchased a bottle of wine, okolehao or rum. The consequence would be

that all refund suits would fail, and Hawaii could be under no disincentive to adopt discriminatory taxes, or to continue their use.

The assertion that appellants have stated the tax separately on their invoices is also unsupported. Not only is the record devoid of any evidence on this point, but also, had the appellee sought such evidence below, it would have found it overwhelmingly to the contrary. The enforcement remedy afforded by Haw. Rev. Stat. § 281-83 is useless, since it provides for the collection, not of the overdue invoice amount, but only of the portion representing the tax (if separately stated), which is a fraction of the total amount owed. Haw. Rev. Stat. § 244-5, on which the remedy in § 281-83 depends, is *permissive,* not mandatory, and because of the futility of the remedy, the right to state taxes separately simply is not used.

Finally, any "windfall" effect is due entirely to the State, which has since 1979 been on notice that its liquor tax was constitutionally defective, and which has allowed the escrowed taxes to accumulate while doing nothing to change its statute and remove the basis for payments under protest. The State is saying in effect that because it has waited too long and let the taxes mount up, the amount now is too huge to be refunded to the taxpayers, so the State should be allowed to realize the taxes instead.[3]

---

[3] Appellants are interested, but not sanguine, to read that the size of their "windfall" will amount to "over 100 million dollars," since they have not paid anywhere near that much in taxes for the years in question. Nevertheless, if anyone stands to realize a windfall in this case it will be the State, which no matter what the outcome will realize the bulk of the taxes escrowed. These are the taxes paid in by appellees McKesson and Paradise, who did not appeal the judgment below.

CONCLUSION

The motion to dismiss or remand should be denied.

Respectfully submitted,

FRANK H. EASTERBROOK

W. REECE BADER
ROBERT E. FREITAS
JAMES A. HUGHES
Of ORRICK, HERRINGTON
& SUTCLIFFE
a Professional Corporation

Of Counsel

ALLAN S. HALEY

(Counsel of Record)

Attorney for Appellants
Bacchus Imports, Ltd.
and Eagle Distributors, Inc

December 1, 1983

(THIS PAGE INTENTIONALLY LEFT BLANK)